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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 99

FRANK ANDREW PAYNE,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

BRIEF FOR THE PETITIONER

Opinion Below 1

Jurisdiction 1

Statutes Involved 2

Constitution of the United States—Fourteenth Amendment 2

Title 18 U.S.C. Sec. 243 2
Ark. Stat. (1947) Sec. 39-201 2
Ark. Stat. (1947) Sec. 39-206 3
Ark. Stat. (1947) Sec. 39-208 4
Ark. Stat. (1947) Sec. 39-209 4
Ark. Stat. (1947) Sec. 39-210 5
Ark. Stat. (1947) Sec. 39-212 5
Ark. Stat. (1947) Sec. 39-301.1 5
Ark. Stat. (1947) Sec. 43-601 6
Ark. Stat. (1947) Sec. 43-605 7

Questions Presented for Review 7

Statement of the Case 8

1. Events which preceded the trial 8
2. Preliminary Motion to Quash Jury Panel 8
3. Testimony relating to confession 10
4. Petitioner's defense 13

Summary of Argument 13

I Confession 13

II Jury Discrimination 14

Argument 15

I Confession—Due Process of Law Guaranteed by the Fourteenth Amendment Was Denied to Petitioner by Introduction Into Evidence After Same Had Been Coerced 15

Page

II Jury Discrimination—There Was Systematic Exclusion of Negroes From the Jury Commission and From the Jury Panel Where Negroes Represent Only 4.3% of the Persons Called for Jury Service for the Past 17 Terms of Court, Although Negroes Comprise 50% of the Total Population and 30% of the Electorate of the County 21

Conclusion 31

CASES CITED

Akins v. *Texas*, 325 U.S. 398, 89 L.ed. 1692 27
Ashcraft v. *Tenn.*, 322 U.S. 143 16
Avery v. *Georgia*, 345 U.S. 559 ..... 29, 30
Brown v. *Allen* (1953), 344 U.S. 443, 73 S.Ct. 397 29
Brown v. *State*, 198 Ark. 920, 132 S.W. 2d 15 18
Cassell v. *Texas* (1950), 339 U.S. 282, 70 S.Ct. 629 ..... 27, 28
Chambers v. *Fla.*, 309 U.S. 227 ..... 15, 16
Commonwealth of Va. v. *Rives*, 100 U.S. 313, 25 L.ed. 512 27
Dewein v. *State*, 114 Ark. 472, 170 S.W. 582 18
Fikes v. *Ala.*, 352 U.S. ——, 1 L.ed. 2d 246 ..... 16, 20, 21
Gallegos v. *Nebraska*, 342 U.S. 55 16
Green v. *State*, 258 S.W. 2d 56 27
Haley v. *Ohio*, 332 U.S. 596 16
Harris v. *S. C.*, 338 U.S. 68 15-16
Hernandez v. *Texas* (1954), 347 U.S. 475, 74 S.Ct. 667 29
Hill v. *Texas*, 316 U.S. 400, 62 S.Ct. 1159 ..... 27, 28
Johnson v. *Penn.*, 340 U.S. 881 21
Leyra v. *Denno*, 347 U.S. 556 ..... 16, 20
Lyons v. *Okla.*, 322 U.S. 596 ..... 20, 21
Malinski v. *N. Y.*, 324 U.S. 401 ..... 16, 20
McNabb v. *U. S.*, 318 U.S. 332 16
Maxwell v. *State*, 232 S.W. 2d 982 27
Norris v. *Alabama*, 294 U.S. 587, 55 S.Ct. 579 ..... 27, 29
Patton v. *Miss.*, 332 U.S. 463, 68 S.Ct. 184 ..... 27, 29
Reece v. *Georgia*, 350 U.S. 85, 76 S.Ct. 167 30
Smith v. *State* (1951), 218 Ark. 725, 238 S.W. 2d 649 27
Stein v. *N. Y.*, 346 U.S. 156 ..... 16, 21

Page

Strauder v. *W. Va.*, 100 U.S. 303, 25 L.ed. 664 26
Thomas v. *Texas*, 212 U.S. 278, 53 L.ed. 512 27
Turner v. *Penn.*, 338 U.S. 62 ..... 16, 21
U. S. v. *Bayer*, 331 U.S. 532 ..... 19, 20
Ward v. *Texas*, 316 U.S. 547 ..... 15, 16
Washington v. *State* (1948), 213 Ark. 218, 210 S.W. 2d 307 27
Watts v. *Ind.*, 338 U.S. 49 21

CONSTITUTION

14th Amendment, Constitution of United States 2, 9, 13, 15, 20, 22, 27, 31

STATUTES

18 U.S.C. Sec. 243 ..... 2, 26
Ark. Stat. (1947) 3-227 ..... 9, 29
Ark. Stat. (1947) 39-201 ..... 2, 9, 22
Ark. Stat. (1947) 39-206 ..... 3, 22
Ark. Stat. (1947) 39-208 ..... 4, 9, 22
Ark. Stat. (1947) 39-209 ..... 4, 22
Ark. Stat. (1947) 39-210 ..... 5, 22
Ark. Stat. (1947) 39-212 ..... 5, 30
Ark. Stat. (1947) 39-301.1 ..... 5, 30
Ark. Stat. (1947) 43-403 18
Ark. Stat. (1947) 43-601 ..... 6, 18
Ark. Stat. (1947) 43-605 ..... 7, 16, 18

OTHER AUTHORITIES

20 Am. Jur., Evidence, Sec. 482 17
III Wigmore, Sec. 855 20

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Arkansas (R. 131) is reported at 295 S. W. (2d) 312.

Jurisdiction

The judgment of the Circuit Court of Jefferson County, Arkansas, was affirmed by the Supreme Court of Arkansas, on November 5, 1956. Rehearing was denied December 3, 1956. Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis were granted on April 8, 1957. The printed record was received by petitioner's counsel on October 19, 1957. The clerk of this court, pursuant

to a request from petitioner under Rule 34 (5), entered an Order on November 12, 1957, extending the time for petitioner to file his Brief to November 25, 1957.

Statutes Involved

CONSTITUTION OF THE UNITED STATES—
14th AMENDMENT.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 18 U.S.C. Sec. 243.

Exclusion of jurors on account of race or color.—No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 696.)

ARKANSAS STATUTES (1947) Sec. 39-201.

Jury Commissioners—Selection—Oath.—Jurors in both civil and criminal cases shall hereafter be selected as follows: The circuit courts, at their several terms, shall select

three (3) jury commissioners, who shall not be related to one another by blood or marriage within the 4th degree, who possess the qualifications prescribed for petit jurymen and who have no suits in court requiring the intervention of a jury. The judge shall administer to the Commissioners the following oath: "You do swear faithfully to discharge the duties required of you as commissioners; that you will not, knowingly, select any person as a juror whom you believe unfit and not qualified; that you will not make known to anyone the name of the jurors selected by you, and reported on your list to the court, until after the commencement of the next term of this court; that you will not, directly or indirectly, converse with any one selected by you as a juror concerning the merits of any suit to be tried at the next term of this court until after said cause is tried or the jury is discharged." Jury commissioners shall receive $5.00 per day for their services.

ARKANSAS STATUTES (1947) Sec. 39-206.

Preparation of Lists of Grand Jurors and Alternates—Qualifications.—They shall select from the electors of the county sixteen (16) persons of good character, of approved integrity, sound judgment and reasonable information, to serve at the next term of the court as grand jurors, and when ordered by the court, shall select such other number as the court may direct, not to exceed nine (9) electors, having the same qualifications, for alternate grand jurors, and make separate lists of the same, specifying in one list the names of the sixteen (16) persons selected as grand jurors, and certify the same as the list of grand jurors; and specifying in the other list the names of the alternate grand jurors, and certifying the same as the list of alternates; said grand and alternate grand jurors shall be selected from all parts of the county.

ARKANSAS STATUTES (1947) Sec. 39-208.

Preparation of Lists of Petit Jurors and Alternates—Indorsement of Lists.—The Commissioners shall also select from the electors of said county, or from the area constituting a division thereof where a county has two or more districts for the conduct of circuit courts, not less than twenty-four (24) nor more than thirty-six (36) qualified electors, as the Court may direct, having the qualifications prescribed in Section 39-206 Arkansas Statutes 1947 Annotated to serve as petit jurors at the next term of court; and when ordered by the court, shall select such other number as the court may direct, not to exceed twelve (12) electors, having the same qualifications, for alternate petit jurors, and make separate lists of same, specifying in the first list the names of petit jurors so selected, and certify the same as the list of petit jurors; and specifying in the other list the names of the alternate petit jurors so selected, and certifying the same as such; and the two (2) lists so drawn and certified, shall be inclosed, sealed and endorsed "list of petit jurors" and delivered to the Court as specified in Section 39-207, Arkansas Statutes 1947, Annotated for the list of grand jurors.

ARKANSAS STATUTES (1947) Sec. 39-209.

Delivery of Lists to Clerk—Oath of Clerk and Deputies—Oath of Subsequently Appointed Deputy.—The judge shall deliver the lists to the clerk, in open court, and administer to the clerk and his deputies the following oath: "You do swear that you will not open the jury lists now delivered to you until the time prescribed by law; that you will not, directly or indirectly, converse with any one selected as a petit juror concerning any suit pending and for trial in this (court) at the next term, unless by leave of the court."

Should the clerk subsequently appoint a deputy in vacation, he shall administer to him the like oath.

ARKANSAS STATUTES (1947) Sec. 39-210.

Clerk to Deliver List to Sheriff—Summons by Sheriff—Return—Day of Appearance.—Within thirty (30) days before the next term, and not before, the clerk shall open the envelopes and make out a fair copy of the list of grand jurors, and a fair copy of the list of alternate grand jurors; also a fair copy of the list of petit jurors, and a fair copy of the list of alternate petit jurors, and give the same to the sheriff or his deputy, who shall, at least three (3) days prior to the first day of the next term, summon the persons named as grand jurors, and the persons named as petit jurors and alternate petit jurors, to attend said term on such day as the court shall have designated by order, as petit jurors, by giving personal notice to each, or by leaving a written notice at the juror's place of residence with some person over ten (10) years of age. The sheriff shall return said list, with a statement in writing of the date and manner in which each juror was summoned: Provided, That if no day for the appearance of the petit jurors shall have been fixed by order of court, they shall be summoned to attend on the second day of the term.

ARKANSAS STATUTES (1947) Sec. 39-212.

Nonattendance of Juror or Alternate—Fine.—If a juror or alternate, legally summoned, shall fail to attend, he may be fined any sum not less than one ($1.00) nor more than thirty dollars ($30.00).

ARKANSAS STATUTES (1947) Sec. 39-301.1.

Fees of Jurors.—Persons whose names appear on any legal and authorized Grand Jury or Petit Jury List of the respective counties of Arkansas, shall receive in addition to any other fees allowable now by law, other than under authority of said Act, No. 48 of 1947 (Section 39-301, Ark.

Statutes, 1947 Official Edition), the following per diem fees:

a. When such person or persons fail for any reason to attend court; None.

b. When such person or persons attend court and are excused by the Court for any reason from serving as a juror or jurors; Five Dollars ($5.00).

c. When such person or persons have been sworn touching their qualifications to serve as a juror or jurors and have been accepted by the Court as qualified: Seven Dollars and Fifty Cents ($7.50).

ARKANSAS STATUTES (1947) SEC. 43-601.

Proceeding When No Warrant Issued.—Where an arrest is made without a warrant, whether by a peace officer or private person, the defendant shall be forthwith carried before the most convenient magistrate of the county in which the arrest is made, and the grounds on which the arrest was made shall be stated to the magistrate, and if the offense for which the arrest was made is charged to have been committed in a different county from that in which the arrest was made, and the magistrate believes, from the statements made to him on oath, that there are sufficient grounds for an examination, he shall, by his written order, commit the defendant to a peace officer, to be conveyed by him before a magistrate of the county in which the offense is charged to have been committed; or, if the offense is a misdemeanor only, the defendant may give bail before the magistrate for appearing before a court or magistrate having jurisdiction to try the offense, on a day to be fixed by the magistrate and named in the bail-bond.

ARKANSAS STATUTES (1947) SEC. 43-605.

Procedure.—When a person, who has been arrested, shall be brought, or in pursuance of a bail-bond shall come, before a magistrate of the county in which the offense is charged to have been committed, the charge shall be forthwith examined; reasonable time, however, being allowed for procuring counsel and the attendance of witnesses. The magistrate before commencing the examination, shall state the charge and inquire of the defendant whether he desires the aid of counsel, and shall allow a reasonable opportunity for procuring it.

Questions Presented for Review

I

Whether due process of law guaranteed by the Fourteenth Amendment was denied petitioner—a mentally retarded 19 year old Negro youth with little education—by introduction into evidence of his "confession" made following an arrest without a warrant and without arraignment before a magistrate and following sustained interrogation with deprivation of food—punctuated by threats of mob violence—while he was held incommunicado from Wednesday morning until Friday afternoon and where several members of his family were arrested without a warrant and petitioner was threatened with the arrest of his mother.

II

Whether members of the Negro race were systematically excluded or their number limited in the selection of the jury panel and of the jury commission where no Negroes had been appointed to jury commission for over fifty years; where Negroes have represented only 4.3% of the persons called for jury service for the past 17 consecutive

terms in a county where Negroes comprise 50% of the total population and 30% of the qualified electors and where names were selected from Poll Tax lists on which the race of the electors is designated.

Statement of the Case

Petitioner has been sentenced to death following conviction for the crime of Murder In The First Degree (R. 48). The Supreme Court of Arkansas has affirmed this judgment (R. 131).

1. Events Which Preceded the Trial

J. N. Robertson, an elderly white lumber man, was found dead in his place of business in the City of Pine Bluff, Arkansas, on Tuesday, October 4, 1955. The petitioner is a 19 year old[1] Negro (R. 98) who actually went to the fifth grade in school (R. 102) but was promoted to the seventh grade on an age basis because he was slow learning (R. 119). The petitioner was arrested on Wednesday morning, October 5, 1955, by the city police of Pine Bluff who had no warrant of arrest (R. 63, 112) and held incommunicado under circumstances to be detailed below until he "confessed" on Friday afternoon.

2. Preliminary Motion to Quash the Jury Panel

The petitioner filed in proper time, his Motion to Quash the Panel of petit jurors for the October Term, 1955, of the Jefferson Circuit Court, alleging that he was a Negro and that no member of the Negro race had ever been selected as a jury commissioner in over fifty years in Jefferson County; and, that although some members of the Negro race had been called for jury duty since 1947,

[1] Petitioner was 19 at the time of the alleged crime.

that Negroes have been discriminated against by an arbitrary and inapportionate limiting of their number by the jury commissioners in violation of the Fourteenth Amendment to the Constitution of the United States.

The Arkansas Statutes provide for the appointment of a three man jury commission by the Circuit Judge prior to the beginning of each term of court[2] and the commissioners are required to select the panel from the electors of the county.[3] The County Clerk keeps the official record of qualified voters (R. 17). and the record reflects the race of the elector (R. 18) as is required by law[4] and the total number of voters in the county at the time of the trial was 19,452 of which, 5,774 were colored and 13,678 were white (R. 18) and this same approximate ratio has existed for the past three years (R. 18).

According to petitioner's exhibit No. 1, which was a certified copy of a population report of Jefferson County for the year 1950 as prepared by the Census Bureau, Jefferson County had a total population of 76,075 of which 37,792 were white persons and 37,835 were Negroes (R. 18).

Jury Commissioner Trulock could not recall a Negro serving as a Jury Commissioner (R. 8), that they were told to get some Negroes on the panel (R. 9), that he could not take anybody that he didn't know and that he was limited by his knowledge of the people whom he was trying to select (R. 10), and that he was not personally familiar with very many Negroes who might be qualified as jurors (R. 11). Neither of the other two Commissioners could recall a Negro ever having served

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[2] Ark. Stat., 39-201, Page 2 herein.

[3] Ark. Stat., 39-208, Page 4 herein.

[4] Ark. Stat., (1947) 3-227 requires that the color of the taxpayer be shown on the poll tax receipt record.

on the Jury Commission (R. 13, 16), and one admitted that he had race in mind when the panel was selected (R. 16).

The Circuit Clerk had never known of a Negro serving on the Jury Commission in Jefferson County (R. 19), and that he kept a record of the names of persons who have actually served on jury panels during the past ten years (R. 19). The Court invited the petitioner's attorney to take the stand to show the actual number of Negroes who have served on jury panels during the past ten years (R. 22), and his testimony revealed that the number of Negroes on each panel for the past 17 consecutive terms of Court has ranged from 0 to 6, the 6 having been reached at only one term and the average being less than 2 Negroes per term (R. 24, 25).

Nine Negroes who had formerly served as jurors testified that they had never heard of a Negro serving on the Jury Commission in Jefferson County and a study of their testimony reveals that at the time of trial their average age was 68 years and they had lived in the county an average of 41 years and most had never served on a jury until within the past three or four years (R. 28-38).

The Motion to Quash the Jury Panel was denied (R. 43), and the defendant was tried by an all White Jury (R. 129).[5]

3. Testimony Relating to Confession

The State sought to introduce an alleged confession into evidence and on objection by the petitioner, the Court and counsel retired to chambers out of the hearing of the jury where testimony relating to the confession was

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[5] There were two Negroes on the panel from which petitioner's jury was selected but one had died prior to the trial and the other was excused because he was opposed to capital punishment (R. 129-130).

had (R. 51). All of the witnesses for the state stated on direct examination that the defendant was not threatened or abused in any manner or promised any reward in consideration of his confession (R. 51, 63, 72, 76, 79, 84).

The petitioner took the stand in his own behalf (R. 88) and testified that he was 19 years of age and that he was arrested about eleven o'clock in the morning on Wednesday, October 5, 1955, while he was at work at the Bluff City Lumber Company and that he normally went home for dinner at twelve o'clock and missed his dinner because he was in jail and that he was not given any dinner or supper at the jail on the day of his arrest (R. 88), that he was awakened about six o'clock the following morning (Thursday) in order to remove his clothing and shoes and was then taken by car to Little Rock without breakfast by the Chief of Police and Sgt. Halsell of the State Police (R. 89); that he was taken to State Police Headquarters in Little Rock where he was given a lie detector test and that he was finally given some shoes about 4:30 (R. 89) but the record is silent as to when he was given clothing and the only food that he was given that day was a sandwich at one o'clock (R. 89); that he was returned to Pine Bluff about six or six-thirty in the afternoon and some time Thursday night was taken to Dumas, Arkansas,[6] by Sgt. Halsell where he was locked up in jail and kept awake most of the night by the jailer who questioned him and made threats that petitioner would be hung (R. 90); that he was given breakfast on Friday morning about ten-thirty and that other than the sandwich which he had on Thursday, this was the only food which he had been given since his arrest on Wednesday morning (R. 92); that two of his brothers and two of a brother's

[6] Dumas is approximately 45 miles southeast of Pine Bluff in Desha County.

children, ages ten and thirteen were arrested and brought to the City Jail at Pine Bluff and that the Chief of Police told Petitioner that he might as well confess or else his whole family would be arrested including his mother (R. 93); that later on Friday, Chief Young came to his cell and told him that there were thirty or forty people outside who wanted to get the petitioner and that if he would tell the truth that he (the Chief) would probably keep them from coming in; and that he then went to the Chief's office and made a confession (R. 94).

The petitioner's brother, a 43 year old preacher (R. 86), testified that he tried to see the petitioner at the City Jail before Friday but was not permitted to see him (R. 87). The petitioner's last teacher testified that he only went to the fifth grade but that he was promoted to the seventh grade because he was then fifteen years old and that he soon dropped out of school (R. 119), and that his grades were mostly D's and F's (R. 120).

Much of the petitioner's testimony was corroborated by the testimony of the State's witnesses on cross-examination. Sgt. Halsell admitted that the petitioner was taken to Little Rock without shoes (R. 56), and Chief Young admitted that petitioner was arrested without a Warrant (R. 63), that it was possible that petitioner had no supper on the day of his arrest (R. 64); that he did not know whether petitioner had breakfast the next morning before being taken to Little Rock (R. 65); that petitioner was never taken before a Magistrate or Judge (R. 65); that petitioner's relatives would not have been permitted to see him within 72 hours after his arrest (R. 66-67); that petitioner's brother and two of his brother's children were brought to jail for questioning as well as another brother and that he told petitioner that there might be thirty or forty people there in the next few minutes, just prior to the confession (R. 69).

Most of the witnesses for the State were people who had been brought in merely to witness the signing of the confession. After the hearing in chambers, the Court overruled the petitioner's objection to the admission of the confession into evidence, and substantially the same testimony was taken again in the presence of the jury (R. 102-130). The confession itself begins on page 97 of the record. The petitioner also took the stand in open court and stated that profanity was directed at him on Thursday while in Little Rock and that in returning the officer told him that if he would tell the truth, that "the most you will get out of it is five or six years" on account of "your age" (R. 124), and that he requested permission to make a telephone call following his arrest and was told that he could not call anyone within 72 hours (R. 125).

4. Petitioner's Defense

Petitioner took the stand and admitted that he struck the decedent, his white employer, with an iron bar, which apparently resulted in his death but that this was done only after the deceased had struck him following an argument, and that petitioner's action was done in the sudden heat of passion.

SUMMARY OF ARGUMENT

I

Confession

The introduction into evidence of petitioner's confession denied due process of law guaranteed by the Fourteenth Amendment because it was obtained after the petitioner had been arrested without a Warrant and held incommunicado from Wednesday morning until Friday afternoon, during which time he was deprived of food for long periods

of time and was taken out of the county to Little Rock for a lie detector test and was then taken to another city for safekeeping where he was threatened by the jailer who told petitioner that "he would be hung." The petitioner was denied the right to consult with a lawyer or members of his family, and two of his brothers and three of his nephews were arrested while petitioner was in the City Jail and the latter was threatened with the arrest of his whole family including his mother if he "didn't tell the truth." He was told by the Chief of Police approximately 30 minutes before his "formal confession" that there were 30 or 40 people outside the jail who wanted to get him and that if petitioner would tell the truth that he, the Chief, could probably keep them from getting in. At this point, the petitioner made his inculpatory statement. The totality of the circumstances that preceded this confession by the nineteen year old mentally retarded petitioner was a denial of due process.

II

Jury Discrimination

There was systematic exclusion of Negroes from the jury commission and from the jury panel in Jefferson County caused by a system of jury selection which relied wholly upon the jury commissioners' personal acquaintance, where commissioners knew few Negroes qualified to serve in a county where Negroes comprise 50% of the total population and 30% of the qualified electors and where the panel is selected from the poll tax record on which the race of the elector is designated. This system has resulted in no Negro serving on the jury commission in Jefferson County for at least 50 years and where Negroes have represented only 4.3% of the persons called for jury service for the past 17 consecutive terms of court and

where the petitioner was tried before an all white male jury and sentenced to death in the electric chair, in violation of the Constitution and laws of the United States.

ARGUMENT

I

Confession

Due process of law guaranteed by the Fourteenth Amendment was denied to petitioner, a mentally retarded 19 year old Negro youth, by introduction into evidence of his "confession" made following an arrest without a Warrant and prior to any arraignment following sustained interrogation with deprivation of food—punctuated by threats of mob violence—while being held incommunicado in jail from Wednesday morning until Friday afternoon, and where several members of his family were also arrested without a Warrant and petitioner was threatened with the arrest of his mother.

Petitioner contends that his confession was coerced as a matter of law. Prior to the introduction of the confession, the trial court properly heard testimony relating to the voluntary character of the confession out of the hearing of the jury and the petitioner proved the existence of many facts which this court frequently has held to be relevant on the issue of coercion:

That he was a Negro,[7] nineteen years of age,[8] had a fifth grade education,[9] that he was held incommunicado from about eleven A. M. on Wednesday, October 5, 1955, until

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[7] In ascertaining whether a confession is coerced, this Court gives weight to the fact that defendant is a member of an unpopular racial group. *Chambers* v. *Florida*, 309 U.S. 227, 237, 241; *Ward* v. *Texas*, 316 U.S. 547, 555; *Harris* v. *South Carolina*,

about two P. M., on Friday, October 7th, that he was denied permission to talk to or phone anyone, that relatives were denied the right to see him or speak to him and he was not arraigned,[10] that he was continuously questioned and abused by officers,[11] that he was taken to Little Rock where he was given a lie detector test and on being returned to Pine Bluff was offered the hope that if he confessed he would only get five or six years on account of his age.[12] Peti-

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338 U.S. 68, 70, as part of considering his "condition in life," *Gallegos* v. *Nebraska*, 342 U.S. 55, 67. See, Mr. Justice Jackson's dissenting opinion in *Ashcraft* v. *Tennessee*, 322 U.S. 143, 156, 173.

[8] Whether the defendant is mature or immature is important in evaluating whether a confession has been coerced. *Haley* v. *Ohio*, 332 U.S. 596.

[9] The degree of education which a defendant has had is an important factor in evaluating whether a confession has been coerced. *Ward* v. *Texas*, 316 U.S. 547, 555; *Harris* v. *South Carolina*, 338 U.S. 68, 70.

[10] Holding petitioner incommunicado was not only in violation of Arkansas law, Sec. 43-605, Arkansas Statutes (1947), but contrary to the almost universal rule. See Statutes collected in *McNabb* v. *U. S.*, 318 U.S. 332, 342, fn. 7. Although there has been some controversy over whether this alone should vitiate a confession is at least a serious factor to be weighed because, "to delay arraignment, meanwhile holding the suspect incommunicado, facilitates and usually accompanies use of 'third degree' methods. Therefore (this Court) regards such occurrences as relevant circumstantial evidence in the inquiry as to physical or psychological coercion." *Stein* v. *New York*, 346 U.S. 156, 187. See also *Harris* v. *South Carolina*, 338 U.S. 68, 71; *Turner* v. *Pennsylvania*, 338 U.S. 62, 64; *Ward* v. *Texas*, 316 U.S. 547, 555; *Ashcraft* v. *Tennessee*, 332 U.S. 143, 152; *Malinski* v. *New York*, 324 U.S. 401, 412, 417; *Turner* v. *Pennsylvania*, 338 U.S. 62, 66, 67; *Fikes* v. *Alabama*, 352 U.S. ——, 1 L.ed. 2d 246.

[11] Continuous interrogation has been deemed an important factor in evaluating whether a confession has been coerced, *Chambers* v. *Florida*, 309 U.S. 227, 231; *Ward* v. *Texas*, 316 U.S. 547, 555; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 154; *Haley* v. *Ohio*, 322 U.S. 596, 600; *Turner* v. *Pennsylvania*, 338 U.S. 62, 64.

[12] A lighter penalty is one of the inducements which was offered in *Leyra* v. *Denno*, 347 U.S. 556. Mr. Justice Minton wrote,

tioner also stated in his testimony that following his arrest at 11 A. M., on Wednesday, that he was not given any food until he was given a sandwich in Little Rock at 1 P. M., on Thursday and that the only other food which he had prior to the alleged confession on Friday afternoon was his breakfast about ten thirty Friday morning in Dumas (R. 92).

It is universally recognized that "a confession of a person accused of crime is admissible in evidence against the accused only if it was freely and voluntarily made, without duress, fear, or compulsion in its inducement and with full knowledge of the nature and consequences of the confession." 20 Am. Jur. Evidence, Sec. 482. The petitioner did not have the mentality or the maturity to understand the nature and consequences of his confession.[13]

All of the surrounding circumstances should be studied in determining whether or not a confession has been coerced. "It has been said that no general rule can be formulated for determining when a confession is voluntary, because the character of the inducements held out to a person must depend very much upon the circumstances of each case. Where threats of harm, promises of favor or benefits, infliction of pain, a show of violence, or inquisitorial methods are used to extort a confession, then the confession is attributed to such influences. It may be said

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at page 585 (concerning the first confession in *Leyra*): such "threats, cajoling, and promises of leniency . . . to induce petitioner to confess were soundly condemned by that Court."

[13] The petitioner testified that he was 19 years of age (R. 88) and that he went to the fifth grade in school (R. 102). Mrs. S. M. Wimberly, the petitioner's last teacher, testified that "he dropped out of school before the term was out, in fact, Frank was of age and they had to skip him from the fifth grade to the seventh grade—he was fifteen years of age . . . " (R. 119) "They promoted him on an age basis because he was slow learning—he was very slow and lazy" (R. 119).

also, that in determining whether a confession is voluntary or not, the Court should look to the whole situation and the surrounding of the accused." *Dewein* v. *State,* 114 Ark. 472, 170 S.W. 582.[14]

In reviewing the situation in the instant case, it should be remembered that the petitioner was arrested without a Warrant,[15] and was never carried before a Magistrate as required by law,[16] either before or after his confession (R. 65), and this deprived the petitioner of the right to be informed that he could have counsel.[17] It has already been explained, supra, how the petitioner was deprived of food and this was accompanied by prolonged questioning.[18] The petitioner was taken to Little Rock the morning following his arrest,[19] where he was given a lie detector test (R. 105). The suggestion of mob violence was raised twice, the first time by the jailer at Dumas,[20] who allegedly told petitioner

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[14] See *Brown* v. *State,* 198 Ark. 920, 132 S.W. 2d 15.

[15] This was probably in violation of Sec. 43-403 of the Ark. Statutes (1947) as a peace officer may only arrest without a Search Warrant when there are reasonable grounds for believing that the person arrested has committed a felony.

[16] Ark. Statutes (1947) Sec. 43-601, p. 6 herein.

[17] Ark. Statutes (1947) Sec. 43-605, p. 7 herein.

[18] The petitioner was questioned on the night of the slaying (Tuesday) and on Wednesday morning prior to his arrest (R. 64) and was questioned again Wednesday afternoon and Wednesday night although the approximate length of time is not in the record. Petitioner was awakened about six o'clock Thursday morning and taken to Little Rock for questioning and a lie detector test and returned to Pine Bluff late in the afternoon about dark (R. 124), and was then taken to Dumas (See fn. 20 infra) where he was kept awake most of the night by the jailer (R. 90, 126) who questioned him.

[19] Little Rock is 45 miles north of Pine Bluff.

[20] There is a dispute in the testimony as to when the petitioner was taken to Dumas. The petitioner contends that it was Thursday night before the confession and the police officer contends that it was on Friday night after the confession.

that he, the jailer, would be there when the petitioner "would be hung" (R. 127), and where references were made about a colored kid in Mississippi.[21] The most serious threat of mob violence was the one suggested by the Chief of Police (R. 128, 113, 93) and the petitioner testified that he was afraid.[22]

There is no dispute that prior to the defendant's confession that two of his brothers and two of his nephews, ages 10 and 13, were arrested and brought to the City Jail (R. 93, 114, 125) and the petitioner was threatened with the arrest of his mother and his entire family "if I didn't tell the truth" (R. 93, 125).

The trial court and the Supreme Court of Arkansas concluded that because "Several witnesses were present when the confession was made and they all testified that "at no time, were there any threats . . ." of petitioner (R. 133), that the confession was voluntarily given. Most of these witnesses, however, were people who were brought in for the sole purpose of witnessing the formal confession (R. 53) and none of them knew anything concerning the treatment accorded the petitioner prior to that time (R. 77, 81, 85). The confession which was admitted into evidence was made by the petitioner within approximately thirty minutes following his inculpatory statements to the Chief of Police (R. 69, 77, 108) and was made at a time when he was laboring under the crushing burden of having already confessed.[23] There had been no significant change in peti-

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[21] This was probably in reference to the atrocious slaying of Emmitt Till near Money, Mississippi, which was in the news.

[22] The petitioner mentions the threat at Dumas and Chief Young's threat about "thirty or forty people outside" as the thing that made him afraid and caused him to confess (R. 128).

[23] As Mr. Justice Jackson wrote in *U. S.* v. *Bayer*, 331 U.S. 532, 540, once an accused has confessed, "no matter what the inducement, he is never thereafter free of the psychological and practical

tioner's situation from the time of his inculpatory statements until his formal confession and such a confession remains coerced as a matter of law unless the State comes forward to overcome the presumption created by the facts. Mr. Justice Minton stated the general rule when he wrote:

> "As in the case of other forms of coercion and inducement, once a promise of leniency is made a presumption arises that it continues to operate on the mind of the accused. But a showing of a variety of circumstances can overcome that presumption. The length of time elapsing between the promise and the confession, the apparent authority of the person making the promise, whether the confession is made to the same person who offered leniency and the explicitness and persuasiveness of the inducement are among the many factors to be weighed." *Leyra* v. *Denno*, 347 U.S. 556, 588.[24]

A study of all the surrounding facts in this case should lead to the conclusion that not only was the alleged confession not voluntarily made but that the petitioner was denied due process of law in violation of the Fourteenth Amendment to our Federal Constitution.[25] Even in cases

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disadvantages of having confessed." In *U. S.* v. *Bayer*, the Court weighed a time lapse of six months and concluded that this length of time in conjunction with only a modicum of restraint vitiated a previous inducement to confess. See Mr. Justice Rutledge's concurring opinion in *Malinski* v. *New York*, 324 U.S. 401, 420, 428; Mr. Justice Murphy's dissenting opinion in *Lyons* v. *Oklahoma*, 322 U.S. 596, 605, 606.

[24] III Wigmore Sec. 855, states: " . . . the general principle is universally conceded that the *subsequent ending* of an improper inducement *must be shown*; i.e. it is assumed to have continued until the contrary is shown." (Italics in original.)

[25] The factual situation in *Fikes* v. *Alabama*, 352 U.S. ——, 1 L.ed. 2d 246 is very similar to the factual situation in the case at bar and there the Court stated that "the totality of the

where the Court has upheld the admission of the confession, they look to all the surrounding circumstances. In *Stein* v. *New York*, 346 U.S. 156 at page 185, the Court said:

> "The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind, might be utterly ineffective against an experienced criminal." [26]

Because of the introduction into evidence of the petitioner's coerced confession, the judgment below should not be allowed to stand.

II

Jury Discrimination

The petitioner is a Negro and members of the Negro race were systematically excluded or their number limited in the selection of the jury panel and of the jury commission where no Negro had ever been appointed to the jury commission and where Negroes have represented only 4.3% of the persons called for jury service for the past 17 consecutive terms in a County where Negroes comprise 50% of the total population and 30% of the qualified electors and where names were selected from poll tax lists on which the race of the elector is shown.

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circumstances that preceded the confessions in this case goes beyond the allowable limits. The use of the confessions secured in this setting was a denial of due process." See also *Turner* v. *Pennsylvania*, 338 U.S. 62 and *Johnson* v. *Pennsylvania*, 340 U.S. 881.

[26] This same standard has been followed in other cases. *Fikes* v. *Alabama*, 352 U.S. ——, 1 L.ed. 2d 246; *Watts* v. *Indiana*, 338 U.S. 49; *Lyons* v. *Oklahoma*, 322 U.S. 596.

The Arkansas Statutes provide for the appointment of a three man jury commission by the Circuit Judge at each term[27] and this commission is charged with the responsibility of selecting from the electors of the County a list of grand jurors[28] and petit jurors.[29] The jurors are to be selected from the electors and should be persons "of good character, of approved integrity, sound judgment and reasonable information." The jury commission turns the list over to the Circuit Judge who delivers it to the Clerk[30] and the latter delivers it to the sheriff within 30 days before the next term of court whose duty it is to summons the persons named to attend Court for jury service.[31]

The petitioner filed in proper time his Motion to Quash the Panel of Petit Jurors for the October Term, 1955, of the Jefferson Circuit Court (R. 2) and alleged that he was a member of the Negro race and a resident of Jefferson County, Arkansas and that no member of the Negro race had been selected as a jury commissioner in over fifty years in Jefferson County; and, that although some members of the Negro race had been called for jury duty in the County since 1947, "that Negroes have been discriminated against by an arbitrary and inapportionate limiting of their number by the jury commissioners who have not sufficiently acquainted themselves with the qualifications of all potential jurors, and that this was in violation of the Fourteenth Amendment to the Constitution of the United States.

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[27] Ark. Stat. 39-201, p. 2 herein.

[28] Ark. Stat. 39-206, p. 3 herein.

[29] Ark. Stat. 39-208, p. 4 herein.

[30] Ark. Stat. 39-209, p. 4 herein.

[31] Ark. Stat. 39-210, p. 5 herein.

The petitioner called several witnesses in support of his Motion to Quash the Panel of Petit Jurors. The three present jury commissioners either did not know or had never heard of a Negro serving as a jury commissioner; the County Clerk, Allen Sheppard, answered "No" when asked if he had ever known of a Negro to serve on a jury commission (R. 17); the Circuit Clerk, M. V. Mead, testified that he had lived in Jefferson County for 59 years, had been Circuit Clerk 12 or 13 years and was County Judge and served as a deputy in the Sheriff's office for several years prior to that (R. 19), and that he could not remember a Negro having ever served on the Jury Commission in Jefferson County. Of nine Negro witnesses who had formerly served as jurors in Jefferson County, none could remember any Negro having ever served as a jury commissioner. This undisputed testimony showed conclusively that Negroes have been systematically excluded from serving as jury commissioners in Jefferson County and the Motion to Quash the Jury Panel should have been granted for that reason.

The petitioner alleged in paragraph 23 of his Motion to Quash the Jury Panel (R. 5) that prior to the March, 1947, term of the Jefferson Circuit Court, not a single Negro had been called for jury service in more than 50 years. As proof of that fact, the petitioner introduced as Exhibit No. 3 to his Motion to Quash the Jury Panel, a Motion to Quash the Panel of Petit Jurors which was filed in the Jefferson Circuit Court on March 27, 1947, in a case then pending, styled, *State of Arkansas* v. *Albert Wilkerson, et al.* (R. 38). The essence of the motion was that no Negro had served on a jury for many years and that there was an unlawful discrimination against Negroes by excluding them from jury service. The docket entry in the Circuit Clerk's office shows that the Motion was granted in the *Wilkerson* case and the panel quashed (R. 43).

Petitioner's Exhibit Number 1 to this motion consisted of a certified copy of the 1950 census report of Jefferson County, Arkansas, as prepared by the U. S. Census Bureau and showed the total population of Jefferson County in 1950 to be 76,075, classified as follows:

Native Born			
White	37,792	Negroes	37,835
Foreign Born			
White	360	Other Races	88

Allen Sheppard, County Clerk, testified that he kept the official record of the qualified voters within Jefferson County and that the race of the taxpayer is reflected therein (R. 17). He testified further that he had made an actual count to determine the number of white and colored qualified electors in Jefferson County for the past three years which revealed the following information:

Year	Total No. Electors	No. White	No. Colored
1953	18,315	12,674	5,641
1954	18,887	13,157	5,730
1955	19,452	13,678	5,774

M. V. Mead, the Circuit Clerk, testified that he kept a record of the names of persons who had actually served on jury panels in Jefferson County and the said record was produced in the hearing on this motion (R. 19). The petitioner attempted to prove the total number of Negroes who had served on the jury panel in the County since 1947 by Henry Albright, a deputy sheriff. Mr. Albright testified that he had been a deputy sheriff in Jefferson County for about 18 years and that he did not think that there had been a single Negro juror that he did not know personally (R. 21). The Court objected to the petitioner's request that Mr. Albright look at the record of jurors from the Clerk's office and pick out by name those persons

whom he knew to be Negroes (R. 22), on the grounds that it would unduly delay the trial. Upon the suggestion of the trial judge (R. 22), the proof sought by Mr. Albright's testimony was made by Counsel for the defendant, who had already examined the jury record in the Clerk's office.

Wiley A. Branton, attorney for the petitioner, testified in the hearing on the Motion to Quash the Jury Panel that he had lived in Jefferson County for all of his 32 years and had been active in political and civic matters, had visited the Courts frequently, and felt that he was qualified by knowledge to ascertain what persons were Negroes by looking at the names on the jury record in the Clerk's office (R. 23). He testified further that he had examined the said jury record and found the following information:

Term of Court	Total No. Jurors	Total No. Negroes
October, 1947	31	2
March, 1948	31	0
October, 1948	38	1
March, 1949	24	2
October, 1949	32	2
March, 1950	64	1
October, 1950	29	0
March, 1951	54	2
October, 1951	35	1
March, 1952	31	2
October, 1952	50	1
March, 1953	42	2
October, 1953	46	6
March, 1954	25	1
October, 1954	39	0
March, 1955	40	4
October, 1955	58	2
TOTAL	669	29

Based on the figures just cited, although Negroes comprise 50% of the total population of Jefferson County and 30% of the qualified electors, Negroes have represented only 4.3% of the persons called for jury service for the past 17 consecutive terms of the Jefferson Circuit Court. The highest number of Negroes ever called for any term of Court was 6 in the October Term, 1953, and this number only represented 13% of the total number called. The petitioner contended in paragraph 22 of his Motion to Quash the Jury Panel that only 23 different Negroes had ever been called for jury service and that more than half of those were over the age of 65 years (R. 4). As proof of that fact, 9 Negroes who had formerly served as jurors testified in the hearing on the motion and the average age of the 9 jurors was 68 years and they had lived in the County an average of 41 years. Most testified that they had never served on a jury until within the past 3 or 4 years and 5 of the 9 have served during more than one term of Court (R. 26-36). Of the 2 Negroes on the present panel, one had died prior to the trial and the other was excused for cause. The defendant was tried by an all white male jury (R. 129).

Congress has expressly provided that no citizen possessing all other qualifications shall be disqualified for service as a juror in any court on account of race or color.[32] The Supreme Court of the United States has held that "the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. *Strauder* v. *West Virginia* (1880), 100 U.S. 303, 25 Law Ed. 664. If there is a denial of the right of Negroes to serve on juries because of their color, then there has been

[32] See Title 18 U.S.C., Sec. 243.

a denial of equal protection of laws as guaranteed by the Fourteenth Amendment.[33]

Since the rulings relating to discrimination on account of race apply to grand juries as well as petit juries, the same ruling should, a fortiorari, apply to the jury commissioners who are charged with the selection of jurors.

The petitioner does not contend that he is entitled to proportional representation or that he is entitled to have a member of his race on the panel or even on the jury that tries him.[34] This court restated the principle that proportional racial representation was not required in *Cassell* v. *Texas* (1950), 339 U.S. 282, 70 Supreme Court 629 in which it stated:

> "Discrimination can arise from the action of Commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve. In such a case discrimination necessarily results where there are qualified Negroes available for jury service. With the large number of colored male residents of the County who are literate, and in the absence of any countervailing testimony, there is no room for inference that there are not among them householders of good moral character, who can read

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[33] See:—*Hill* v. *Texas*, 316 U.S. 400, 62 S.Ct. 1159; *Patton* v. *Mississippi*, 332 U.S. 463, 68 Supreme Court 184; *Norris* v. *Alabama*, 294 U.S. 587, 55 Supreme Court 579. This same ruling has also been followed by the Supreme Court of Arkansas. *Maxwell* v. *State*, 232 S.W. 2d 982; *Green* v. *State*, 258 S.W. 2d 56.

[34] This Court has held that proportional representation is not required. See: *Commonwealth of Virginia* v. *Rives*, 100 U.S. 313, 322, 25 Law Ed. 667, 670; *Thomas* v. *Texas*, 212 U.S. 278, 282, 53 Law Ed. 512, 513; *Akins* v. *Texas*, 325 U.S. 398, 404, 89 Law Ed. 1692. The Arkansas Supreme Court has followed this same view in *Washington* v. *State* (1948), 213 Ark. 218, 210 S.W. 2d 307 and in *Smith* v. *State* (1951), 218 Ark. 725, 238 S.W. 2d 649.

and write, qualified and available for grand jury service." [35]

The effect of the testimony of jury commissioners Trulock,[36] Bobo[37] and Williams[38] is to bring the case squarely within the holding in *Cassell* v. *Texas, supra* in which Mr. Justice Reed stated at page 289, "When the commissioners were appointed . . . it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors . . . without regard to race and color. They did not do so here, and the result has been racial discrimination."

The petitioner contends that while the jury commission has gone about to systematically include a few Negroes on the panel, they have done so in such a manner as to further discriminate against the Negro by restricting the num-

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[35] The Court was quoting from *Hill* v. *Texas*, 316 U.S. 400, 404, 62 Supreme Court 1159, 1161.

[36] (R. 9) "A. . . . I felt that in the selection of a jury I could not take anybody that I didn't know. He might be a better qualified man than the one I would call, but still I wouldn't know it, so I was limited again by my knowledge of the people whom I was trying to select . . .

Q. Mr. Trulock, state whether or not you are personally familiar with very many Negroes in this County who might be qualified as jurors? A. I don't think I am sir."

[37] (R. 14) "Q. Mr. Bobo, how broad is your knowledge of Negroes in this County who would be qualified for jury service in your opinion? A. That I couldn't answer. I know quite a few colored people. I have been doing business with them quite a while and I know quite a few. All of them wouldn't be qualified, they don't have poll tax receipts, therefore, wouldn't be eligible for jurors. We had to go by the list, people who paid their poll tax."

[38] (R. 16) "Q. Did you have race in mind when you selected the Negroes for the panel? A. Yes.

Q. Did you feel that there should be some on the panel? A. Yes.

Q. Did you think it should be on a proportional basis or any certain number? A. I didn't give that any thought.

Q. Was anything said as to how many should be on there? A. Nothing in particular. We decided that we should have some on each panel. I think we put some on each panel."

ber to such a few that it would be virtually impossible to actually get a Negro on a particular jury without the approval of the prosecutor, even though there may be Negroes on the panel.[39] It should tax the credulity of this court to say that mere chance resulted in such few Negroes being called for jury service where 50% of this class make up the population of Jefferson County and 30% of the qualified electors.[40]

The situation in Jefferson County, Arkansas, where but a few Negroes have been called for jury service during the past 17 terms of court shows a long continued exclusion and verdicts returned against Negroes by such juries should not be allowed to stand[41] as, "token summoning of Negroes for jury service does not comply with equal protection."[42] It should also be pointed out that it was easy for the jury commission to discriminate against Negroes because they were furnished with a record of the qualified electors and the County Clerk testified that such records show the race of the taxpayer (R. 57).[43] "Obviously that practice makes it easier for those to discriminate who are of a mind to discriminate."[44]

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[39] The state has ten preemptory challenges in a capital case in Arkansas.

[40] In *Hernandez* v. *Texas* (1954), 347 U.S. 475, 74 Supreme Court 667, the petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin American surnames. The petitioner was of Mexican descent and offered evidence showing that for the last 25 years there is no record of a person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County. The Court adopted the "rule of exclusion" as supplying proof of discrimination as established by *Norris* v. *State of Alabama*, 294 U.S. 587, 55 Supreme Court 579.

[41] *Patton* v. *Mississippi*, 332 U.S. 463, 68 Supreme Court 184.

[42] *Brown* v. *Allen* (1953), 344 U.S. 443, 73 Supreme Court 397.

[43] Ark. Stat. (1947) 3-227 Requires that the race of the tax payer be shown on the poll tax record.

[44] In *Avery* v. *Georgia* (1953), 345 U.S. 559, 73 Supreme Court 891, the jury commissioners printed the names of white persons

In *Avery* v. *Georgia,* 345 U.S. 559, the late Chief Justice Vinson held the system used there unconstitutional because it facilitated discrimination and because the commissioners did not follow a nondiscriminatory course of conduct. The characteristics which condemned the system in the *Avery* case also doomed the system here. They make discrimination easier and require following a course of conduct which operates to discriminate.

The trial court implied that the jury commission has selected many colored people who at their request the court has excused and that their names do not show on the payroll record because they don't draw pay (R. 25) and the Supreme Court of Arkansas, gave weight to this factor when it said "On the other hand it was shown that many others, the numbers undisclosed, had been selected but had not served for different reasons" (R. 138). All jurors are required under the Arkansas law to attend Court in answer to the summons by the Sheriff,[45] under penalty of a fine and if they attend and are then excused from serving for any cause they are still entitled to a fee of $5.00 even though they do not serve.[46] Therefore, the payroll record was probably an accurate record of all Negroes who had been called for jury service.

In any event, the whole of petitioner's evidence in connection with his Motion to Quash the Jury Panel went uncontradicted by the State and therefore should have been granted.[47]

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on white tickets and of Negroes on yellow tickets, and placed them in a box, however, no Negro names were ever drawn from the box.

[45] Ark. Stat. 1947, 39-212 p. 5 herein.

[47] *Reece* v. *Georgia,* 350 U.S. 85, 76 Supreme Court 167.

[46] Ark. Stat. 1947, 39-301.1 p. 5 herein.

CONCLUSION

The petitioner has set forth in his argument a number of events which should show that his confession was coerced and that he was denied due process of law in violation of the Fourteenth Amendment to the Constitution by the introduction of the confession into evidence against him and that his conviction which followed should not be allowed to stand. The petitioner has also made as strong a showing as he possibly could that members of his race were discriminated against in the selection of the jury commission and of the petit jury panel at the time of his trial and for many years prior thereto.

Therefore, because of the denial of each of the constitutional rights complained of in this Brief, the petitioner submits that the judgment below should be reversed.

Respectfully submitted,

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